

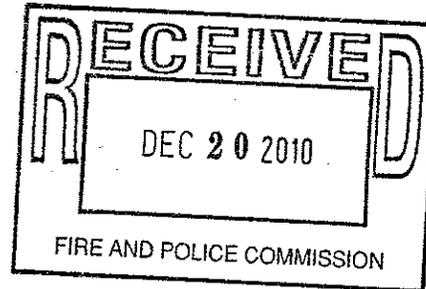
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December 17, 2010



Mr. Michael Tobin
Executive Director
Fire & Police Commission
City Hall, Room 706

Re: Harris v. City of Milwaukee Fire & Police Commission
Case No. 2009-CV-19790

Dear Mr. Tobin:

Enclosed please find a copy of the circuit court's decision denying Mr. Harris' petition for a writ of mandamus.

Very truly yours,

MAURITA HOUREN
Assistant City Attorney

MH/cdr

Enclosure

1095-2010-152/164562

JESSE H. HARRIS

Plaintiff- Petitioner,

vs.

Case No: 2009-CV-19790

CITY OF MILWAUKEE FIRE & POLICE COMMISSION,

Defendant-Respondent.

DECISION AND ORDER DENYING PETITION FOR WRIT

CASE BACKGROUND

This petition arises from the destruction of evidence by the Milwaukee Police Department (“MPD”) allegedly in violation of its policies after the sentencing of Petitioner, Jesse H. Harris (“Harris”), for sexual assault. In February 1988, the Milwaukee County District Attorney’s Office charged Harris with four counts of abduction, eleven counts of first degree sexual assault, impersonating a police officer, and habitual criminality after Harris allegedly assaulted four young girls. On August 10, 1988, Harris pled guilty to eight counts of first degree sexual assault in exchange for the dismissal of the remaining counts. He was sentenced to seventy-five years of incarceration.

Following his sentencing, Harris challenged his conviction on numerous occasions. The following list provides a timeline of Harris’s challenges:

1. September 7, 1988: Harris sought post-conviction relief pursuant to Wis. STAT. § 974.06(1), but filed an untimely notice of intent to file post-conviction relief.
2. June 1, 1989: The Wisconsin Supreme Court ruled that Harris was allowed to extend the time to file his post-conviction relief motion. This decision permitted Harris to file his subsequent motions for relief.
3. May 9, 1989: Harris filed a motion for post-conviction to withdraw his guilty plea.
4. August 16, 1989: The circuit court denied the May 9th motion.
5. October 17, 1989: Harris filed a notice of appeal in regards to the May 9th motion.

6. August 8, 1990: The court of appeals affirmed the judgment of conviction and the trial court's order denying Harris's motion for post-conviction relief, determining that Harris had entered the plea "knowingly and voluntarily and that he was not coerced," and that Harris failed to meet his burden that his trial counsel was ineffective.
7. November 20, 1992: Harris filed a *pro se* WIS. STAT. § 974.06(1) motion that was denied.
8. December 31, 1992: Harris filed a *pro se* motion to dismiss charges that was denied. Soon after, Harris filed an application for supplemental motion for 974.06 that was denied. Harris appealed the denial of these motions, but voluntarily dismissed the appeal.
9. January 1994: Harris, through an attorney, filed a WIS. STAT. § 974.06(1) motion that was denied and affirmed by the court of appeals.
10. March 23, 1998: Harris filed a WIS. STAT. § 974.06(1) motion that was denied.
11. February 27, 2003: Harris filed a WIS. STAT. § 974.06(1) motion. In addition to reiterating his earlier claims, he now alleged that his counsel was ineffective because he failed to request DNA testing of the evidence. The circuit court denied his motion. The court of appeals affirmed.
12. 2005: Harris unsuccessfully sought a writ of habeas corpus in federal court. *See Harris v. Endicott*, 2005 WL 2593585 (unpublished) (E.D. Wis. 2005). The District Court dismissed for lack of jurisdiction. However, it stated that even if it had jurisdiction, the petition was untimely under the one-year statute of limitations because Harris acknowledged that he was aware of the destruction of the evidence in 2001, but did not file his petition until 2003.
13. June 29, 2006: Harris filed a citizen complaint with the Fire & Police Commission alleging that the rape kits relating to four sexual assaults that he previously pled guilty to were destroyed by the Milwaukee Police Department in contravention of its policies regarding evidence retention. In August 2006, the Commission denied jurisdiction over the complaint.
14. December 3, 2007: Harris filed a request with the Commission to request to reopen the complaint he filed in June 2006. On Dec. 14, 2007, the Commission advised Harris that the Commission was not the proper forum for dealing with his allegations.
15. December 19, 2007: The Commission received a letter from Harris's attorney requesting a hearing to determine who destroyed the evidence, particularly the rape kits. The Commission did investigate Harris's assertion that the rape kits were destroyed contrary to Milwaukee Police Department policy. Ultimately, the Commission maintained that the investigation proved that there was no violation of police department policy.

From this list, it is clear that Harris has raised several different arguments in hopes of relief. Of particular importance is his argument relating to the destruction of evidence. Specifically, it is Harris's belief that the MPD destroyed evidence in bad faith and in direct contradiction and violation of police policies and procedures. Harris's argument focuses on five specific groupings of evidence:

1. The rape kit of KFP, destroyed September 20, 1989.
2. Harris's clothes, destroyed July 18, 1990.
3. The rape kit of LJ, destroyed September 9, 1994.
4. The rape kit of EB, destroyed September 15, 1994.
5. The rape kit of LT, destroyed October 8, 1998.

Even if Harris can prove that the evidence was in fact destroyed, he can only move forward with the dismissal of his case if he can prove bad faith on the part of the police department. To show bad faith, he must have evidence that the police acted in contradiction to their policies and procedures when destroying the evidence. The only evidence that Harris has produced are the dates the evidence was destroyed, the policies that were in force at the time, and the procedural history of his case. The following chart is arranged by the five groupings of evidence and presents the policies in force as well as the procedural history of the case at the relevant time.

Evidence	Date of Destruction	Policies in force at the Time	Procedural History of the Case
The rape kit of KFP	September 20, 1989	Rules written on Nov. 12, 1984 Relevant language: Section 36 states that all felony evidence shall be retained as follows, "Where a suspect has been charged and convicted, the evidence may be disposed of one year following the date of sentencing if no appeal has been filed."	<ul style="list-style-type: none"> • August 10, 1988: Harris sentenced. • September 7, 1988: Notice of intent to file post-conviction relief filed (late). • May 27, 1989: Wisconsin Supreme Court granted motion to extend time to file post-conviction relief. • September 20, 1989: Evidence destroyed. • October 17, 1989: Notice of appeal filed.
Harris's clothes	July 18, 1990	Rules written on November 12, 1984 (see above)	
The rape kit of LJ	September 9, 1994	Rules written on November 12, 1984 (see above)	<ul style="list-style-type: none"> • Mar. 22, 1994: Harris sought post-conviction relief pursuant to WIS.

			<p>STAT. § 974.06.</p> <ul style="list-style-type: none"> • April 11, 1994: Harris appealed the circuit court's denial to the court of appeals. • September 9, 1994: Evidence destroyed. • March 6, 1995: The court of appeals affirmed the circuit court's decision.
The rape kit of EB	September 15, 1994	Rules written on November 12, 1984 (see above)	Same timeline as LJ's rape kit.
The rape kit of LT	October 8, 1998	<p>New rules promulgated in 1996.</p> <p>Relevant language: Section 3/560.145D states,</p> <p>“(1) All sexual assault DNA evidence shall be retained indefinitely unless disposal is expressly authorized by the commanding officer or designee in the sensitive crimes division; and (2) all biological DNA evidence in any felony investigation shall be retained indefinitely.”</p>	<p>March 3, 2008: Michael Tobin, executive director of the City of Milwaukee Fire & Police Commission, stated that the rape kit was destroyed with the approval of Lieutenant William Joers, supervisor of the sensitive crimes division. Typically, Joers consults the District Attorney's office to see if any court procedures were pending. However, a letter from the District Attorney's office says no inquiry was made.</p>

This evidence does not demonstrate bad faith on the MPD's part; Harris now petitions this Court for a writ of mandamus to order a thorough inquiry by the City of Milwaukee Fire and Police Commission to determine if the police acted in contradiction to the Commission's policies and procedures. This petition is now before the Court.

I. STANDARD OF REVIEW

Mandamus is an “extraordinary writ” that is be used to “compel public officers to perform a duty that they are legally obligated to perform.” *Walton v. Hegerty*, 2008 WI 74, ¶ 7, 311 Wis.2d 52, 751 N.W.2d 369 (2008). A party seeking a writ of mandamus must show that (1) the party has a clear legal right; (2) the duty sought to be enforced is positive and plain; (3) the party will

be substantially damaged by nonperformance of such duty; and (4) there is no other adequate specific legal remedy for the threatened injury. *Lake Bluff Hous. Partners v. South Milwaukee*, 197 Wis.2d 157, 170, 540 N.W.2d 189 (1995); *Miller v. Smith*, 100 Wis.2d 609, 302 N.W.2d 468 (1981). The issuance of a writ of mandamus is “largely controlled by equitable principles and subject to the equitable doctrine of laches.” *Iushewitz v. Milwaukee County Personnel Rev. Bd.*, 176 Wis.2d 706, 711, 500 N.W.2d 634 (1993). For laches to apply in a mandamus action, “there must be unreasonable delay, lack of knowledge on the part of the party asserting the defense that the other party would assert the right on which he bases his suit, and prejudice to the party asserting the defense in the event that the suit is maintained.” *Id.* at 711–12.

Whether to grant a writ of mandamus rests in the discretion of the court to which application is made. *Davy Eng’g Co. v. Clerk of Town of Mentor*, 221 Wis.2d 744, 585 N.W.2d 832 (Wis. Ct. App. 1998). Thus, the court may consider whether issuance of the writ is necessary to prevent a failure of justice and the importance of the matter, and whether its issuance would work confusion or lead to inequitable results. *State ex rel. Sullivan v. Hauerwas*, 254 Wis. 336, 36 N.W.2d 427 (1949). However, it is an abuse of discretion to refuse the writ in a clear case, and where an abuse appears, the refusal will be reversed on appeal. *Law Enforcement Standards Bd. v. Vill. of Lyndon Station*, 101 Wis.2d 472, 305 N.W.2d 89 (1981). In addition, when a trial court bases a discretionary decision on an erroneous view of the law, it is also an abuse of the court’s discretion. *State ex rel. Lank v. Rzentkowski*, 141 Wis.2d 846, 416 N.W.2d 635 (Wis. Ct. App. 1987). The trial court also abuses its discretion when it exercises its discretion based on findings that are clearly erroneous, or does not exercise its discretion at all. *Save Our Fire Dept. Paramedics Comm. v. City of Appleton*, 131 Wis.2d 366, 389 N.W.2d 43 (Wis. Ct. App. 1986). It is also an abuse of discretion for a court to compel action through mandamus when the duty is not clear and unequivocal and requires the exercise of discretion. *State ex rel. LaFollette v. Bd. of Supervisors of Milwaukee County*, 109 Wis.2d 621, 327 N.W.2d 161 (Wis. Ct. App. 1982).

II. PARTIES’ ARGUMENTS

a. Petitioner Harris’s Argument

Harris presents two arguments to support his request for a writ of mandamus. First, he argues that it is the proper remedy. Second, he argues that the police had a duty to follow their own policies and to preserve the four rape kits.

In regards to his first argument, Harris relies on the *Zawerschnick* case for support. In that case, the court stated that mandamus is a proper remedy to compel public officers to perform duties arising out of their office and presently due to be performed. *State ex rel City of West Allis v. Zawerschnick, School Clerk, and Others*, 275 Wis. 204, 206, 81 N.W.2d 542 (1957). Based on this principal, Harris believes that he has a legal right to have a hearing. He notes that WIS. STAT. § 62.50(3) provides for this right because it authorizes the Fire and Police Commission to prescribe rules and regulations for the control and management of the police department. § 62.50(3) states,

(a) The board may prescribe rules for the government of the members of each department and may delegate its rule-making authority to the chief of each department. The board shall prescribe a procedure for review, modification and suspension of any rule which is prescribed by the chief, including, but not limited to, any rule which is in effect on March 28, 1984.

WIS. STAT. § 62.50(3)(a). It is Harris's position that if the statute gives the Fire and Police Commission the authority to prescribe rules and regulations, it is incumbent on the Commission to see that those rules and regulations are applied uniformly and fairly. Harris maintains that he has the right to see that those rules and regulations are performed consistently and uniformly. Furthermore, he will be damaged without a hearing because only by having a hearing can Harris prove bad faith on the part of the police department in destroying the rape kits. There is no other remedy because there is no other way for Harris to force the police officers who had custody and control of the rape kits to testify under oath. Harris argues that the *Jungbluth* decision support this position. In *Jungbluth*, the police destroyed evidence. The court held that it could only give relief to the defendant if the police acted in bad faith in destroying the evidence. *Jungbluth v. Arizona*, 488 U.S. 51, 102 L.E.D.2d 281, 109 S.Ct. 333 (1998).¹ Harris then goes on to argue that in contrast to what the Commission may argue, the record does not support a finding of laches since Harris has pursued his rights to the best of his ability since his 1988 conviction. Additionally, there is no reason to find mandamus to be inequitable.

In regards to his second argument, Harris relies on the *Flessas* case. In *Flessas*, the court stated that the prosecution has a duty to preserve evidence that might be expected to play a significant role in a suspect's defense. *Ozaukee County v. Flessas*, 140 Wis.2d 122, 409 N.W.2d

¹ Harris provided the incorrect citation for this case. The correct citation for this case is: *Arizona v. Youngblood*, 488 U.S. 51, 109 S.Ct. 333 (1988).

408 (Wis. Ct. App. 1987). The court also discussed the impact of the laches defense. It noted that for laches to arise, there must be an unreasonable delay, knowledge of course of events and acquiescence therein, as well as prejudice to the party asserting the defense. In this case, Harris admits that there was a delay—he was convicted in 1988 and did not ask for a hearing before the Fire and Police Commission until 2006. However, he explains away this delay by arguing that it was not until he read the *Hicks* case that he realized the importance of the rape kits. In *State v. Hicks*, the court recognized for the first time that DNA evidence could be used to find a defendant in a sexual assault case not guilty. *State v. Hicks*, 202 Wis.2d 150, 549 N.W.2d 435 (1996).

b. Respondent City of Milwaukee Fire & Police Commission's Argument

It is the Commission's position that Harris has not met the criteria for a writ of mandamus to be issued and that the doctrine of laches precludes the issuance of a writ of mandamus.

The Commission begins by pointing out that Harris has failed to satisfy any of the elements necessary for the Court to issue a writ of mandamus. First, the Commission notes that Harris has not established "a clear, specific legal right" that must be enforced by the Commission. Harris asks this Court to issue a writ of mandamus, ordering the Commission to conduct a thorough inquiry as to the facts leading up to the destruction of the evidence. However, the Commission already investigated Harris's allegations and determined that they were unfounded. In light of the Commission's investigation, it is unclear what Harris means by an inquiry. The destruction of the first three rape kits was governed by the 1984 Rules. Under these rules, neither the District Attorney nor Harris's defense counsel requested that the first three rape kits be retained. Accordingly, they were destroyed within one year after Harris's conviction. Harris did not file an appeal until October 1989. There is no evidence to suggest that the police department was notified that Harris was intending to file one month later. What Harris is really arguing is that the police department should have taken some affirmative steps to discover whether he was appealing his guilty plea. The language of the policy in effect at the time, however, did not require the department to affirmatively seek out such information. Similarly, it is the Commission's position that the fourth rape kit was properly destroyed under the direction of Lieutenant Joers. Joers was not required to indicate in writing the reason he approved the destruction of the fourth rape kit, nor was he required to indicate in writing who he consulted in making the decision.

Next, the Commission argues that there are other adequate remedies at law. First, the Commission points out that even if it were to entertain Harris's argument, there is no adequate remedy for Harris under the Commission's power. Specifically, even if the facts were changed such that the Commission's investigation revealed that the evidence retention policy was not followed, the most the Commission could do now is to hold a just cause hearing under WIS. STAT. § 62.50(17) for the persons who did not adhere to the policy. However, a just cause hearing would have no impact on Harris. Additionally, the Commission maintains that Harris cannot argue that there is no other remedy at law. As evidenced by Judge Manian's 2003 decision and the court of appeals 2004 decision, Harris's remedy for any alleged improper destruction of evidence would be in criminal court. The City of Milwaukee did not prosecute Harris—the state did. And, the fact that Harris was denied the post-conviction relief he sought in criminal court based on his allegations that his attorneys were ineffective because they failed to preserve the rape kits provides no basis for any suggestion that the police did not comply with their own policies. The issue of any alleged impropriety in the destruction of the rape kits, in the context of Harris's post-conviction motions, has already been decided. As such, not only did Harris have an adequate remedy at law via a post-conviction motion in criminal court, but he has already availed himself on numerous occasions to this adequate remedy.

Alternatively, the Commission argues that the doctrine of laches precludes the issuance of a writ of mandamus. It is the Commission's position that even if Harris could establish a right to a hearing or further investigation, laches precludes the writ. The Commission notes that there clearly has been an unreasonable delay in this case. Specifically, Harris waited seventeen years to bring this matter before the Commission. The only explanation Harris provides is that it was not until he read the 1996 case that he understood the importance of the rape kits. This explanation does not make the delay reasonable because Harris had a lawyer representing him on his appeals. Additionally, it cannot be credibly argued that the filing of a citizen complaint in 2006 questioning the propriety of destroying rape kits from a 1988 conviction is timely.

III. ANALYSIS

There are four criteria for the issuance of a writ. They include: (1) a clear legal right; (2) a positive and plain duty to be performed; (3) substantial damages; and (4) lack of an adequate

legal remedy. It is useful to look at each of the requirements individually when assessing Harris's petition to determine whether he has satisfied his burden in demonstrating all of the elements.

A clear legal right

In order to issue a writ of mandamus, the petitioner must have an absolute right. *Lake Bluff*, 197 Wis.2d 157. Harris asserts that his legal right to a writ of mandamus ordering the Commission to conduct an inquiry is outlined in WIS. STAT. § 62.50(3). As noted above, 62.50(3) states,

(a) The board may prescribe rules for the government of the members of each department and may delegate its rule-making authority to the chief of each department. The board shall prescribe a procedure for review, modification and suspension of any rule which is prescribed by the chief, including, but not limited to, any rule which is in effect on March 28, 1984.

WIS. STAT. § 62.50(3)(a). Based on this language, it is Harris's position that he has a legal right to demand that the Commission properly enforce the rules it prescribes. In particular, since the Commission established rules regarding the destruction of DNA evidence, Harris maintains that he can demand that the Commission determine whether the police acted in bad faith when destroying the evidence relating to Harris's conviction.

The Court finds that Harris does have a legal right, especially when it considers the language in Rule XV, Citizen Complaint Procedure, of the Rules of the Board of Fire and Police Commissioners. The relevant language in Rule XV provides,

PURPOSE. The citizen complaint procedure addresses misconduct alleged to have been committed by Fire or Police Department members.

...

COMPLAINT. A complaint may be initiated by mail, email, telephone, website, or in person.

RULES OF THE BOARD OF FIRE AND POLICE COMMISSIONERS, Rule XV, Citizen Complaint Procedure, Sections 1, 2. The language in the Citizen Complaint section clearly establishes the right for citizens, like Harris, to make complaints to the Commission about police officers who have allegedly engaged in misconduct, like failing to follow proper evidence destruction procedures. Because a right seemingly exists, however, the analysis does not end here.

A positive and plain duty to be performed

The next element that Harris must demonstrate is that there is a positive and plain duty to be performed by the Commission. Specifically, for mandamus to be the proper remedy to require performance of an act or duty, the duty must be clear or at least free from substantial doubt. *Lake Bluff*, 197 Wis.2d 157. The duty must, moreover, be presently and actually due at the time of the application for the writ. *Id.* All conditions precedent to its performance must be met, including a prior demand if the duty is of a private nature. *State v. Waggenson*, 140 Wis. 265, 122 N.W. 726 (1909). No prior demand for performance is necessary if the act or duty is public and absolutely enjoined by law. *State ex rel. Burnham v. Cornwall*, 97 Wis. 565, 73 N.W. 63 (1897). The writ will be denied if the law alleged to require performance is so vague and indefinite as to render performance impracticable, is invalid, failure to perform in no way affects legal rights of the petitioner, or the duty to perform or right to performance is doubtful. *State ex rel. City of Madison v. Walsh*, 247 Wis. 317, 19 N.W.2d 299 (1945). However, it is improper to deny the writ on the ground that the underlying law does not clearly impose a duty to act where by court construction and statutory interpretation the duty may be made clear. *Morrissette v. De Zonia*, 63 Wis.2d 429, 217 N.W.2d 377 (1974).

Harris asserts that the duty that the Commission must perform is outlined in WIS. STAT. § 62.50(3)(a). Harris argues that since this statute gives the Commission the power to prescribe rules, it necessarily also requires that the Commission investigate and evaluate whether the rules it puts forth are properly executed. The specific duty that Harris claims is embodied in this language is that the Commission must conduct a proper inquiry into any allegation of improper conduct.

The Court can make one of two conclusions about whether a positive and plain duty exists for the Commission: (1) it can conclude that the language presents no clear duty of inquiry; or (2) it can find that such a duty exists, but that the Commission has already carried out this duty in Harris's case. To reach the first conclusion, the Court focuses closely on the language in WIS. STAT. § 62.50(3)(a). While the language clearly sets forth that "[t]he board may prescribe rules for the government of the members of each department," the language does not establish if and/or how that the Commission is to evaluate the execution of such rules. Harris does not point to any other language to clarify this matter. Instead, Harris argues that such a duty is implied. Even if the duty is implied, it is unclear what Harris means by "inquiry." Since it is unclear, the

Court cannot find that it is in fact a positive and plain duty for the Commission to conduct an inquiry.

Alternatively, the Court can find that a duty to conduct an inquiry exists but that the Commission has already carried out this duty. To find that a positive and plain duty exists, the Court can look to language outside of WIS. STAT. § 62.50(3)(a). Specifically, the Court relies on the language in Rule XV. Just as it sets forth Harris's right to have the Commission explore an alleged violation of the rules, so too does it outline the actual procedure by which the Commission must investigate such claims. Specifically, section 5 explains how the Commission investigates and resolves a complaint.² Based on this language, the Court concludes that the

² The actual language states,

RESOLUTION. Complaints will be resolved by the following methods:

(a) RAPID RESOLUTION COMPLAINT INQUIRY.

1. A Rapid Resolution Complaint Inquiry (RRCI) is a complaint filed with the FPC and then forwarded to the department for quick resolution. The complainant is questioning the actions of an employee of the Fire or Police Department concerning a matter that does not, on its face, appear to be a violation of a department rule.

2. The department that receives a RRCI referral will follow its applicable standard operating procedures to resolve the complaint.

3. The Executive Director will review the completed RRCI.

(b) TRIAL. Trials will be conducted in accordance with FPC Rule XVI Trial Procedures.

(c) DISMISSAL. The complainant will be advised in writing of the reason(s) for the dismissal. A complainant may, within thirty (30) days after the date of the notice of dismissal, request in writing that the dismissal be reviewed by the Board.

(d) MEDIATION. Mediation is the process in which both the complainant and employee agree to resolve a complaint with the assistance of a neutral mediator. Information disclosed during a mediation session is confidential and cannot be used in any subsequent proceeding. When making a referral to mediation, the Executive Director will consider whether mediation is likely to result in greater complainant satisfaction; improve citizen understanding of department procedures and actions; result in improved employee conduct; or contribute to increased community relations. Normally a complaint will not be referred to mediation if the case involves an allegation of criminal conduct against an employee, use of force involving bodily injury, or if the employee is a witness against the complainant in a court proceeding.

Procedure:

Commission has a positive and plain duty to investigate a complaint of alleged rule violation. The Court cannot end its analysis here, however. Instead, it must highlight that in Harris's case, the Fire & Police Commission has already acted on this duty. The timeline the Background section of this memorandum, specifically bullet point sixteen, notes the Commission's conduct. It states,

[Dec. 2007:] The Commission received a letter from Harris's attorney requesting a hearing to determine who destroyed the evidence, particularly the rape kits. The Commission did investigate Harris's assertion that the rape kits were destroyed contrary to Milwaukee Police Department policy. Ultimately, the Commission maintained that the investigation proved that there was no violation of police department policy.

See supra Background. These are important facts. In the context of a writ of mandamus, these facts reveal that issuing such an order would most certainly be futile. This is not a case where a duty exists and the Commission has failed to act on it. Instead, the Commission has already followed the proper procedure in Harris's case. The result—a finding that there was no bad faith.

Substantial damages

The Court must next identify whether Harris has demonstrated that he will experience substantial damage if the Court does not issue a writ of mandamus. The law provides that a petition for a writ should not be granted unless grave hardship or irreparable harm will result.

Imposition of Sanctions in Alt v. Cline, 224 Wis.2d 72, 589 N.W.2d 21 (1999). Harris claims that

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1. Complaint is received by an FPC investigator, and a complaint number is assigned.
 2. The FPC investigator conducts an initial review and forwards to the Executive Director.
 3. The Executive Director makes the determination to refer the complaint to the mediation resolution process.
 4. Complainant and employee(s) are contacted and confirm they are willing to participate in the mediation process.
 5. Complaint is scheduled for mediation conducted by mediator.
 6. Mediation session is conducted at a neutral location.
 7. Complainant and employee(s) acknowledge resolution of the complaint, or the mediator certifies that the employee participated in the mediation session.
 8. Complaint is dismissed.

(e) POLICY TRAINING. The Executive Director may require a member to participate satisfactorily in a specified policy training program.

the Court must grant his petition because a writ of mandamus offers him the only avenue by which to attack his conviction. Without the writ, Harris believes he will experience grave hardship because he will not be able to demonstrate that the police acted in bad faith when they destroyed the evidence relevant to his case.

The Court concludes that Harris will not experience substantial damage or irreparable harm if it denies his petition. First, the results of an inquiry and investigation by the Fire & Police Commission will have no direct effect on Harris's conviction. As noted above, the Commission already conducted the investigation that Harris seeks and determined that the police did not act in bad faith. This decision did not make Harris any worse off than before he filed his complaint.

Second, even if this Court entertained Harris's petition and ordered the Commission to conduct another investigation and the investigation uncovered bad faith, Harris would still not experience any direct relief. The only measures that the Commission can take are to discipline and reprimand the officers who may have acted in bad faith. *See generally* RULES OF THE BOARD OF FIRE AND POLICE COMMISSIONERS, available at http://city.milwaukee.gov/ImageLibrary/Groups/cityFPC/Rules/100603_FPC_RULES.pdf (describing that misconduct results in an officer's hearing and possible disciplinary actions aimed at the officer).

As noted above, in *Youngsblood*, the U.S. Supreme Court held that the failure of the police to preserve potentially useful evidence is not a denial of due process of law absent a defendant's showing of bad faith on the part of the police. 488 U.S. 51. Harris focuses his attention on the "bad faith" portion of this holding. However, he overlooks another element to putting forth a successful challenge—"potentially useful evidence." Put simply, to challenge the destruction of evidence on due process grounds, Harris needs to demonstrate two elements: (1) that the evidence was potentially useful; and (2) that the police acted in bad faith when they destroyed it. Even if Harris could collect evidence that the police acted in bad faith when they destroyed the evidence relevant to his case, he would still not get over the hurdle of demonstrating that the evidence was potentially useful. In fact, the decisions relating to Harris's previous motions for post-conviction relief already addressed the usefulness of such DNA evidence. Specifically, Judge Manian held that Harris "made no showing that the evidence [is] highly exculpatory or reasonably probably to alter the outcome." *State of Wis. v. Harris*, No. 88CF880314, No.

88CF880498 (Milwaukee County Circuit Court May 8, 2003). The Wisconsin Court of Appeals affirmed this decision. *State of Wis. v. Harris*, No. 05-CV-00532 (Wis. Ct. App. 2004).³

Based on all of these considerations, it is clear that Harris would not suffer any substantial damage if this Court dismissed his petition. In fact, quite the opposite is true. It seems that the courts as well as the Fire & Police Commission have allowed Harris to really pursue all possible avenues to prevent him from experiencing irreparable harm.

Lack of an adequate legal remedy

Finally, the Court must evaluate whether Harris has successfully demonstrated that there are no other adequate legal remedies besides a writ of mandamus that will allow him to pursue his claims. The law establishes that in order for a court to issue a writ of mandamus, there must be no other adequate legal remedy available. *Moore v. Stahowiak*, 212 Wis.2d 744, 569 N.W.2d 711 (Wis. Ct. App. 1997). Mandamus is accordingly not available where the result sought can adequately be accomplished or full relief obtained by another action.⁴ However, the remedy available, other than mandamus, must be "adequate." *Hough v. Dane County*, 157 Wis.2d 32, 458 N.W.2d 543 (Wis. Ct. App. 1990). It must be one well adapted to remedy the wrong complained of. *State v. Telgener*, 199 Wis. 523, 227 N.W. 35 (1929). Additionally, it is important to note that where the act complained of can be reviewed by appeal, certiorari, or writ of error, it is improper to resort to mandamus and the writ will be denied, since it is not the function of mandamus to serve the purposes of an appeal or writ of error. *State ex rel. Morke v. Wis. Parole Bd.*, 148 Wis.2d 250, 434 N.W.2d 824 (Wis. Ct. App. 1988).

As alluded to above, it is Harris's position that a writ of mandamus offers him the only way to challenge his conviction based on the theory of the improper destruction of evidence. Harris's assertion is incorrect. The Commission properly notes that there are in fact other adequate legal remedies available to Harris. Harris simply seems to overlook the adequacy of these other

³ The courts also pointed out that since they found that Harris entered his guilty pleas knowingly, intelligently, and voluntarily, he gave up the right to pursue pre-trial motions, like testing physical evidence.

⁴ For examples, see *State v. Keeler*, 205 Wis. 175, 236 N.W. 561 (1931) (Mandamus is not a proper remedy to regain possession of goods or articles taken under an illegal search warrant where the articles seized are clearly contraband, replevin being an adequate remedy.); *Elkhorn Area School Dist. v. East Troy Community School Dist.*, 127 Wis.2d 25, 377 N.W.2d 627, 29 Ed. Law Rep. 370 (Wis. Ct. App. 1985) (Where it was unknown during a school district's first action to recover tax revenue paid erroneously to another school district whether a statutory notice of injury provision was applicable, there remained question of whether an adequate remedy at law still existed and, therefore, a mandamus action could not be brought during the first proceeding since there was still arguably an adequate remedy at law.).

remedies because his pursuit of post-conviction relief through these other means has resulted in unfavorable findings. The Court notes that an unfavorable finding is not synonymous with an inadequate remedy. Additionally, Harris's other adequate remedies include the criminal court as the proper forum for Harris to seek relief. Judge Manian's decision as well as the court of appeals' 2004 decision support this conclusion. These cases dealt expressly with the issue that Harris presents to this Court—the effects of the destruction of evidence on Harris's conviction. Since such other remedies are available and they are adequate, the Court concludes that issuing the writ is inappropriate.

the doctrine of laches

The issuance of a writ of mandamus is “largely controlled by equitable principles and subject to the equitable doctrine of laches.” *Iushewitz*, 176 Wis.2d at 711. For laches to apply in a mandamus action, “there must be unreasonable delay, lack of knowledge on the part of the party asserting the defense that the other party would assert the right on which he bases his suit, and prejudice to the party asserting the defense in the event that the suit is maintained.” *Id.* at 711–12. Laches is not a rule limiting the time within which an action may be brought, but rather, it is an equitable defense to the action based on the plaintiff's unreasonable delay in bringing the action under circumstances in which the delay is prejudicial to the defendant. *In re Estate of Flejter*, 2001 WI App 26, 240 Wis.2d 401, 623 N.W.2d 552 (Wis. Ct. App. 2000). The rule was developed to prevent assertion of stale claims and to remedy injustices that might arise from the fact that a statute of limitations ordinarily applicable to the assertion of a legal right did not apply in an equitable action. The essence of it is that negligence and delay in asserting a right may, considering the lapse of time and changes of circumstances, render it unjust to recognize the asserted right and warrant denial of relief. *Id.* No arbitrary rule exists by which stale demands may be ascertained and characterized so as to defeat an alleged claim or right. *Russell v. Fish*, 149 Wis. 122, 135 N.W. 531 (1912). Each case must rest largely upon its own facts and circumstances. *Winslow v. Winslow*, 257 Wis. 393, 43 N.W.2d 496 (1950).

Harris claims that the doctrine of laches does not preclude the issuance of a writ of mandamus in this case. He admits that there was a delay in bringing a claim against the Commission. However, he believes that this delay was reasonable. Harris points out that the reason for the delay was that he did not initially read the 1996 case of *State v. Hicks* and appreciate the importance of rape kits.

The Court finds that Harris's delay was unreasonable. Accordingly, it notes that even if Harris satisfied all of the elements for the issuance of a writ of mandamus, the doctrine of laches precludes this Court from granting it. To support the finding of the application of laches to this case, the Court must explain that Harris's delay was unreasonable, that the Commission lacked the knowledge that Harris would now assert such a claim against it, and that the Commission would be prejudiced by such a claim. Clearly, there has been an unreasonable delay. Harris was convicted in 1988. Since that time, he has filed numerous motions for post-conviction relief. He could have easily raised any issues that he had with the Commission along with those motions. Harris claims that he could not have done so because it was not until he read the *Hicks* case that he understood the importance of the rape kits. This argument does not outweigh his delay. The court decided the *Hicks* case in 1996. Yet, it was not until 2006 that Harris filed a complaint with the Commission. Additionally, Harris was represented by an attorney when he filed most of post-conviction motions. Even if Harris was unaware of the case and could not file his complaint quickly, this Court cannot excuse such behavior on the part of an attorney.

Given the unreasonable delay, it is also practical for this Court to conclude that the Commission lacked the knowledge that Harris would pursue such a claim against it. In early 2000, Harris had filed several motions that concerned the destruction of evidence. If he planned to assert similar arguments against the Commission that would have been the appropriate time to do so. Since nothing was filed, it is reasonable to conclude that the Commission was not expecting a future suit. Additionally, given the remedy that the Commission can provide—disciplining an officer—it is even more clear that it lacked the knowledge that Harris would bring a claim against it. The Commission is not the proper forum for Harris. It cannot provide him with post-conviction relief. It is reasonable for the Commission to assume that Harris would have never implicated in a complaint. Finally, the Commission would clearly be prejudiced if this Court issued the writ. The Commission already investigated Harris's citizen complaint. Requiring the Commission to conduct further inquiry would waste the Commission's time and resources.

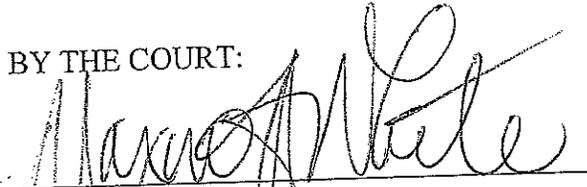
IV. CONCLUSION AND ORDER

Based on the entire record of this case, the briefs and arguments of the parties and the law, IT IS HEREBY ORDERED, that Harris's petition for a writ of mandamus is DENIED.

This is the final decision of this Court for the purposes of appeal.

Dated at Milwaukee, Wisconsin this 13th day of December 2010.

BY THE COURT:

A handwritten signature in cursive script, appearing to read "Maxine A. White". The signature is written in dark ink and is positioned above a horizontal line.

Judge Maxine A. White
Milwaukee County Circuit Court Judge Branch 1